EDITOR'S NOTE

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NO. 85-632

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

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SUPREME COURT, U.S.

CHARLES ATKINS, Commissioner of the
Massachusetts Department of Public Welfare,

Petitioner,

-vs-

SANTOS RIVERA, MADELINE McKENNA,
and all others similarly situated,

Respondents.

MOTION FOR LEAVE TO
PROCEED IN FORMA PAUPERIS

Respondent Madeline McKenna asks leave to file the attached Brief in Opposition to Petition for a Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts and to proceed in forma pauperis pursuant to Rule 46. Upon respondent's affidavit of indigency the filing fee was waived by the Massachusetts Superior Court.

The affidavit of respondent Madeline McKenna in support of this motion is annexed hereto.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

NO. 85-632

CHARLES ATKINS, Commissioner of the Massachusetts Department of Public Welfare,

Petitioner

vs.

SANTOS RIVERA, MADELINE McKENNA, and all others similarly situated,

Respondents

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, Madeline McKenna, being first duly sworn, depose and say that I am a respondent in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of opposing the appeal are true.

1. Are you presently employed? No.

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

   b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

   July 26, 1985 - $1169.86/month

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? Yes.

   a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

   Unemployment Compensation: $336/mo. since 8/8/85

3. Do you own any cash or checking or savings account?

   No.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

   Yes.

a. If the answer is yes, describe the property and state its approximate value.

One automobile valued at $400.00.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

Chris McKenna - son.

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

Madeline McKenna
MADELINE MCKENNA

Subscribed and sworn to before me this 8th day of October, 1985.

Steven A. Hitov
STEVEN A. HITOV

My Commission Expires: 5/6/88

Let the applicant proceed without prepayment of costs or fees or the necessity of giving security therefor.

Justice of the Supreme Court

NO. 85-632

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

CHARLES ATKINS, Commissioner of the
Massachusetts Department of Public Welfare,

Petitioner,

-vs-

SANTOS RIVERA, MADELINE McKENNA,
and all others similarly situated,

Respondents.

BRIEF FOR RESPONDENT MADELINE McKENNA IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

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STATEMENT OF THE CASE

This case concerns whether 42 USC §1396a(a)(10)(C)(i)-(III), which requires a State Medicaid plan to use "the same methodology" in determining Medicaid eligibility as would be used in determining eligibility for the equivalent cash public assistance program (here Aid to Families with Dependent Children [AFDC]), allows Massachusetts to count six months' income in determining Medicaid eligibility while it counts only one month's income in computing AFDC eligibility* and also counts only one month's income for other Medicaid applicants. The court below held it did not. Petition, A25-26.

Respondent McKenna, a working mother earning only $3.50/hr., sought Medicaid coverage in order to continue orthodontic treatments for her minor son. Record Appendix below, p. 94; Petition, A57-59. Her son's teeth had been pulled and top braces installed under Medicaid while she was receiving AFDC. Record Appendix below, p. 97. Faced with a bill of $1,540 for bottom braces and adjustments to complete the prescribed care for her son, Id., she lost her full Medicaid coverage because she lost AFDC eligibility. By virtue of the six-month budgeting rule Medicaid coverage ceased to be available for her and her son.

The other respondent, Ms. Rivera,** also a working mother, incurred $414.00 of medical bills for herself and one of her minor children over a three-month period, including $314.00 in a single month. Record Appendix below, pp. 73-75. Although her liability for medical bills was computed under Medicaid as only $100.30/month, none of the bills was covered even in part by Medicaid because Massachusetts used a six-month budget period and required her to incur $601.80 of bills before Medicaid coverage would be available. Petition, A51.

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* The use of a one-month eligibility computation for AFDC is required by 42 USC §602(a)(13), as amended by P.L. 97-35, §2315(a). By §2171(a)(3) of that same act Congress enacted the "same methodology" language at issue herein.

** Respondent Rivera is not participating in this Court.

SUMMARY OF ARGUMENT

The decision below concerns the construction of a statute which Congress is currently re-examining and as to which further amendment is likely by early 1987, before a decision is likely to be reached on the merits if the petition were to be granted. Massachusetts, like other states, is otherwise obliged to operate its Medicaid program for families and children [the "AFDC-related" class here] differently than it does for other Medicaid recipients [the "SSI-related" class of aged, blind and disabled persons involved in Hogan v. Heckler, 769 F.2d 886 (1st Cir. 1985)]. Thus compliance with the judgment herein will not unduly burden Massachusetts, just as the use of one month Medicaid budgeting alone or dual one- and six-month systems has not burdened other large urban states. Moreover, the decision below is correct both for the reasons set forth below and for reasons unique to Massachusetts, and it should not be disturbed.

REASONS FOR DENYING THE WRIT

I

BEFORE THIS CASE IS LIKELY TO BE DECIDED ON THE MERITS CONGRESS SHOULD BE RE-EXAMINING THE STATUTE IN QUESTION

Given the current calendar of cases awaiting argument and the time required for consideration of the petition herein, it is likely that this case would not be argued on the merits until the fall of 1986.* By that time Congress is likely to be re-examining the scope of the "same methodology" provision of 42 USC §1396a(a)(10)(C)(i)(III) pursuant to §2373(c) of the Deficit Reduction Act of 1984, P.L. 98-369.

That statute enacted a moratorium on federal sanctions against States for alleged noncompliance with the "same methodology" requirement. It required the Secretary of the Department of Health and Human Services ("HHS") to report to Congress concerning the appropriateness and impact on both states and Medicaid recipients of the "same methodology" provision and to provide recommendations for changes in that requirement. P.L. 98-369, §2373(c)(3). That report was to have been filed within 12 months after the July, 1984 enactment of the statute, Id.; it is currently overdue and will presumably be filed shortly. Thereafter the moratorium will continue for another 18 months, P.L. 98-369, §2373(c)(2), until the spring of 1987 (assuming prompt filing of the HHS report).

There is every reason to believe that Congress will be closely examining the scope and meaning of the "same methodology" statute so as to resolve any uncertainties and to clearly establish federal policy in this area prior to the expiration of the moratorium. Already Congress has before it legislation

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* According to the count in U.S. Law Week, in addition to the 87 cases carried over there were 55 cases granted review this Term through November 4, 1985. Last Term petitions on which action was taken after January were carried over the Term. In a case like this, where the Department of Health and Human Services is not a party, the Court frequently requests that the United States file a brief before considering the petition, e.g. Blum v. Toomey, 435 U.S. 949 (1978). If such were done here the petition would likely not be ruled upon until February, 1986.

to clarify the scope of the moratorium, H.R. 1868, §9 (99th Cong., 1st Sess.) and the "same methodology" language has been the subject of extensive prior legislative consideration. P.L. 97-35, §2171(a)(3) revised the longstanding language of the statute, and after Congressional displeasure with HHS regulations interpreting it, e.g. 127 Cong.Rec. H7052 (Oct. 6, 1981; remarks of Rep. Waxman), the current language was enacted. See H.R.Rep. No. 757, Part 1, 97th Cong., 2d Sess. 13 (1982).

Consideration of the merits of this case is thus likely to proceed simultaneously with Congressional consideration of revisions to the statute. Not only should the establishment of national policy in this complex area be left to the Congress as a matter of principal and of judicial restraint, but also it will avoid the expenditure of the scarce resources of this Court on a matter of statutory construction that may be moot before it is decided. That is precisely what has happened before where a Medicaid policy was reviewed by this Court but the concerns of the States led to a Congressional resolution of the issue before the merits could be reached. Beltran v. Myers, 451 U.S. 625 (1981).

It is unlikely that any conflicting lower court opinions on this question will affect other States.* As a very practical matter the issue herein is of interest solely to Massachusetts, and as such should not be resolved by this Court.

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* Of the cases on the issue referred to in fn. 11 on p. 20 of the petition, the two from Illinois are long concluded [Srogan v. Miller, 537 F.Supp. 139 (N.D.Ill. 1982) and Coleman v. Miller, No. 82-C-6259 (N.D.Ill. 1984)], and the appeal in Cashman v. Perales, Civ. 85-0639-T (W.D.N.Y. Aug. 29, 1985), has been withdrawn by stipulation subject to reinstatement after disposition of this case by this Court (2d Cir. No. 85-7763 Nov. 1, 1985). Plaintiffs in the First and Second Circuit cases, Hogan v. Heckler, 769 F.2d 886 (1st Cir. 1985), and DeJesus v. Perales, 770 F.2d 316 (2d Cir. 1985), represented as well by the undersigned counsel herein, will not petition for certiorari if certiorari has been denied herein prior to the expiration (after possible extensions) of their time to petition for certiorari. Likewise in Cashman, where plaintiffs-appellants are represented by the undersigned counsel of record herein, the appeal will not be reinstated if the petition is denied herein.

II

THE USE OF A ONE-MONTH BUDGET PERIOD FOR THE AFDC-RELATED CLASS WILL NOT UNDULY BURDEN MASSACHUSETTS

The petition is predicated, in large part, on the different results reached by the court below and the court of appeals in Hogan v. Heckler, 769 F.2d 886 (1st Cir. 1985). What petitioner ignores is that the two cases apply to two different groups of Medicaid recipients, as to whom Massachusetts must already apply many different rules and procedures.

This case concerns the AFDC-related (families and children); Hogan concerns the SSI-related (the aged, blind and disabled). The budgeting procedures for determining eligibility for Medicaid for these two groups are, by virtue of the "same methodology" requirement, already vastly different for the two groups. Thus, for example, while a state must use at least the AFDC standard work expense disregard of $75.00 per month* in computing net earned income for the AFDC-related class, it must use the entirely different SSI disregards of $65/month plus half the remainder in computing net earned income for the SSI-related class in Hogan. See Calkins v. Blum, 511 F.Supp. 1073, 1092-1093 (N.D.N.Y. 1981), aff'd 675 F.2d 44 (2d Cir. 1982). That Massachusetts will, under the judgment below, have to further budget the class herein differently from other Medicaid applicants is hardly unique.

Massachusetts currently uses a one-month budget period for many nursing home patients, 106 C.M.R. §506.620(A), so the use of dual eligibility periods is nothing new to it. Other large urban States have been and are, by virtue of choice or litigation, in the same position of using dual eligibility periods. New York has always used a one-month budget period for almost all services other than inpatient hospital care, for

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* See Heckler v. Turner, ___ U.S. ___, 105 S.Ct. 1138, 84 L.Ed. 2d 138 (1985).

which it uses a six-month budget period. 18 NYCRR §360.5(d)-(1).* In Illinois, the State was required to use one-month budgeting for the SSI-related in 1982, Brogan v. Miller, 537 F.Supp. 139 (N.D.Ill. 1982), but it continued to use six-month budgeting for the AFDC-related until enjoined as to them two years later. Coleman v. Miller, No. 82-C-6259 (N.D.Ill. 1984).

Moreover, the alleged fiscal impact on Massachusetts (Petition, pp. 22-23) is a speculation of dubious validity that is not borne out by the experience of other States.** The $19.6 million estimated cost of implementation of the judgment below in its first year represents less than 2% of the 1985 Massachusetts Medicaid budget of $1,117,920,000 [from Joint Appendix in Hogan v. Heckler, supra, p. 122]. The reference at p. 23 of the Petition to a $208 million estimated cost increase for the SSI-related in Hogan is both irrelevent and misleading. Whatever implementation of one-month budgeting might cost for the SSI-related class in Hogan, the fact is that Massachusetts prevailed in that action. Additionally, that estimate is based upon figures contradicted by other data that Massachusetts itself submitted in the same case: The $208 million estimate was computed using an average Medicaid cost estimate of $6,000 per year per recipient [Joint Appendix in Hogan, p. 108], while a subsequent affidavit showed average costs of $3,528 for the disabled [Hogan Joint Appendix, pp. 118 and 121]. With data like that the cost estimates of petitioner, even in this case, are simply worthless.

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* Currently, and since early 1985, only inpatient hospital care has been subject to a six-month budget period; previously a six-month period was also used in New York for prosthetic devices including dentures.

** In Illinois, after the Coleman case, supra, the State's Medicaid budget for the affected group did not significantly increase after the changes from six-month to one-month budgeting required therein. For the AFDC-related class the pre-Coleman Fiscal Year 1983 expenditures were $35,610,000. In Fiscal Year 1985, the first full post-Coleman year, they were only $36,501,000. Illinois Department of Public Aid Bureau of Management and Budget, "Medical Assistance Expenditures by Recipient Category FY83-FY85." Indeed, the State of Illinois did not appeal in either case. California, another large urban state with an extensive Medicaid program, uses a one-month Medicaid budget period without apparent fiscal distress.

III

THE JUDGMENT BELOW IS CORRECT

The decision below, both as a matter of plain English and legislative history, is clearly correct. As the Supreme Judicial Court recognized, Petition A25-26, the choice of a budget period is inherently part of the "methodology" for determining income eligibility. Because the cash AFDC program uses a one-month budget period and thus counts only one month's income in determining eligibility, an AFDC applicant can go on AFDC for a month, obtain all needed medical care under Medicaid in that month, and cease participating in the program the next month. A subsequent new job, increased earnings or other increased income, will not deprive that AFDC recipient of that one month's Medicaid coverage by virtue of counting her income for the next five months. For respondents and the class, however, because six months' income is counted instead of one, they cannot utilize Medicaid at all without being reduced to the Medicaid level for six months.

Not only does this result fly in the face of the plain language of the statutory requirement for use of the "same methodology," but it ignores the fact that the "same methodology" language was part of the same act that mandated use of one-month AFDC budgeting. See p. 1 *, supra. By its very nature "income," the measure used to determine eligibility for both AFDC and Medicaid, is time related. Saying that respondent McKenna has $140 of income is to say nothing of use. If that were her hourly income she would be a large firm lawyer. If that were her daily income she would be "middle class." Since it was in fact her gross weekly wage, she is poor and must struggle just to meet the essential needs of her child and herself.

The petition also ignores the requirement of 42 CFR §435.401(c) prohibiting states from using "requirements for determining eligibility for [e.g. the medically needy class here] that are - (1) For families and children, more restrictive

than those used under the state's AFDC plan; ..." If the one-month period for counting income under AFDC is not part of the "methodology" as petitioner contends, and if it is not a "requirement" under this regulation, it is hard to imagine what it is. Plainly it is both.

The judgment below was also correct for a reason apparently unique to Massachusetts. Because the Massachusetts Medicaid income levels are slightly above those for AFDC, while people whose income fits in that gap are over income for AFDC, they receive Medicaid as AFDC-related medically needy with no spend-down. Despite its use of a six-month budget period for the AFDC-related with spend-downs, for those with no spend-down Massachusetts uses a one-month budget period. 106 C.M.R. §§506.400, 506.410, 506.500. This violates the requirement of 42 USC §1396a(a)(17) that Medicaid eligibility standards be "comparable for all groups"* and provisions of 42 CFR §435.831 implementing that statute. Neither permits the use of a dual standard based solely on how much income the medically needy applicant has.

The judgment below is correct and should not be reviewed.

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* While the courts below did not address the claims under 42 USC §1396a(a)(17), Petition, p. 11 n. 6, this one aspect of those claims can support the judgment below since it is based purely on a question of law requiring no further factual development. Schweiker v. Hogan, 457 U.S. 569, 585 n. 24 (1982). Further evidence would be required as to the claims that the Massachusetts six-month spend-down is unreasonable and inconsistent with the objectives of the Social Security Act, 42 USC §§1396a(a)(17)(A) and (C). Those arguments were neither made nor addressed in DeJesus v. Perales, 770 F.2d 316, 323 (2d Cir. 1985), so that decision would not necessarily conflict with relief under §1396a(a)(17) here. The analysis in DeJesus based on the "comparable standards" language of §1396a(a)(17) was limited to a comparison of the eligibility standards for the AFDC-related medically needy and the AFDC categorically needy, not a comparison of standards for two groups within the AFDC-related class here.

CONCLUSION

For the reasons stated the petition for a writ of certiorari should be denied.

Dated: November 8, 1985

Respectfully submitted,

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